IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-2584

Summary Calendar

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ANNIE R. CAVITT,

Plaintiff-Appellant,

v.

KATHRYN J. WHITMIRE, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas
CA H 90 0466

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May 19, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Annie R. Cavitt appeals from the district court's dismissal of her case with prejudice for lack of prosecution. Finding that the district court abused its discretion, we reverse and remand for further proceedings.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On February 9, 1990, Annie R. Cavitt, though her attorney, Carnegie H. Sims, Jr., filed a complaint against her former employer, the City of Houston, and various City officials, including the mayor. Asserting both federal constitutional and state statutory claims, Cavitt alleged that the City had terminated her on account of her age and in retaliation for both Cavitt's administrative complaint filed with the Equal Employment Opportunity Commission and her whistle-blower activities. She also alleged that the City had denied her due process of law by discharging her without an adequate pre-termination hearing.

On August 28, 1990, the defendants filed a "Request for Additional Time to Answer `Plaintiff's First Request for Production of Documents' and `Plaintiff's First Set of Interrogatories.'" The district court granted the defendants' motion on September 11, 1990. On February 11, 1991, the plaintiff filed a motion to compel the defendants to respond to the plaintiff's interrogatories.

On June 11, 1991, the district court issued a pre-trial scheduling order, pursuant to Federal Rule of Civil Procedure 16, in which the parties were ordered to file a joint pre-trial order on or before January 7, 1992. The case was set for trial on January 21, 1992. The district court also ordered the parties to complete discovery by November 15, 1991. On December 20, 1991, the parties filed a "Joint Motion to Extend Time" for filing a joint pre-trial order. On December 31, 1991, the district court

granted the joint motion and extended the time for filing a joint pre-trial order to June 15, 1992. On March 31, 1992, the defendants filed a motion to extend time for discovery. The district court granted this motion on April 7, 1992, although the district court apparently misunderstood the motion as a *joint* motion, when in fact the plaintiff had not joined in the motion.[1]

On May 27, 1992, the parties filed a second "Joint Motion to Extend Time" for filing a joint pre-trial order. The district court denied that motion on June 4, 1992. Plaintiff's counsel claims, and defendants' counsel does not dispute, that the district court's denial of this motion was not received by the plaintiff's counsel until June 15, 1992.[2]

Pursuant to a June 10, 1992 order by the district court, the parties attended a pre-trial conference conducted by the district court on June 16, 1992. At that conference, the district court noted that the parties had failed to file their joint pre-trial order by the June 15, 1992 deadline. Counsel for the plaintiff stated that a draft of that motion was prepared and would be given to counsel for the defendants for his approval before filing. Counsel for the plaintiff stated that "[w]e will ask the

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[1] Not only did the district court grant the motion in an order which purported to grant a "*Joint* Motion to Extend Time Deadlines," but the district court also referred to the "[p]arties" as having filed the motion at the subsequent pre-trial conference.

[2] The record reveals that the district court's order was not filed with the clerk of the court until June 9, 1992.

Court for an extension to file." The district court responded, "I don't grant extensions. I just don't. It is not fair."

The parties then indicated that, other than their failure to file a joint pre-trial order, they were ready to go to trial, which was scheduled to begin on June 29, 1992. Counsel for the plaintiff stated that the parties had engaged in "quite [an] extensive bit of discovery." Counsel for the defendants agreed that discovery had proceeded further along since the time of the defendants' March 31, 1992 motion to extend the time for completing discovery. Counsel for the defendant explained why he had been previously delayed in completing the discovery he wished to engage in for the purpose of filing a motion for summary judgment:

> Mr. Mims [counsel for the plaintiff] and I have worked on the discovery, Your Honor. I was unfortunately tied up in a -- because of our reassignments over there in a lengthy case, I was in arbitration hearings for 11 days, over four indefinite suspensions of police officers . . . .

At the close of the pre-trial hearing, the district court admonished the parties to attempt to reach a settlement and ordered them to negotiate in a jury room. The court then stated, "I'm going to hold off ruling on anything. You are set [for trial] on [June] 29th as of now."

Six hours later, after the parties informed the court that a settlement could not be reached, the district court sua sponte dismissed the case for lack of prosecution. In its brief order, the district court stated that:

> [A]fter two extensions of time for discovery and two years had elapsed in this case, the parties filed a third request for extension of discovery deadlines [on May 27, 1992]. . . . Counsel for plaintiff has failed not only to file a joint pretrial order but also has failed to offer any explanation for ignoring this Court's order regarding the deadline for filing the document. In light of that fact, and the fact that the file as a whole reveals a complete inattention on the part of both counsel for the plaintiff and the defendant, the Court determines that this case should be dismissed [with prejudice] for want of prosecution.

Two days later, on June 18, 1992, counsel for plaintiff filed a pre-trial order with the district court.[3] In the following week, counsel for the plaintiff also filed both a Motion to Leave to File a Joint Pre-trial Order Out of Time and Motion to Reinstate. Counsel for the plaintiff stated that at the June 16, 1992 pre-trial conference he did not foresee that the district court was planning to dismiss the case because of the parties' tardiness in filing the joint pre-trial order. Thus, he did not explain why the joint pre-trial order had not been filed. Counsel for the plaintiff further explained that he had been involved in four trials during late May and June of 1992 and that he also had familial obligations, including the attendance of college graduations of two daughters, that prevented him from submitting a draft of the joint pre-trial order to counsel for the defendant for his approval. The district court refused to accept the explanations offered by

[3] That pre-trial order was not signed by the counsel for the defendants, who refused to do so after the district court dismissed the case with prejudice.

counsel for the plaintiff and denied his motions. The plaintiff filed a timely notice of appeal.

## II.

Dismissal of a case with prejudice for want of prosecution is an acceptable sanction in certain cases when a party with the burden to prosecute fails to comply with a district court's orders or deadlines. See generally Link v. Wabash Railroad, 370 U.S. 626 (1962). Both the district court's inherent powers, see id., and the Federal Rules of Civil Procedure permit such a sanction in an appropriate case, see FED.R.CIV.P. 16(f) & 37(b)(2)(B). Appellate review of a district court's decision to impose such a sanction is governed by an abuse of discretion standard. See Morris v. Ocean Systems, Inc., 730 F.2d 248, 251 (5th Cir. 1984).

As this court has previously recognized, "[t]he cases in this circuit in which dismissals with prejudice have been affirmed on appeal illustrate that such a sanction is reserved for the most egregious of cases . . . . " Rogers v. Kroger Co., 669 F.2d 317, 320-21 (5th Cir. 1982) (citing cases). Typically, such cases have involved not simply a failure to comply with a single order or deadline, but also a pattern of "clear delay or contumacy." See John v. State of Louisiana, 828 F.2d 1129, 1131-33 (5th Cir. 1987). Moreover, we have recognized certain "mitigating" factors that strongly militate against such a harsh penalty. In particular, dismissal should ordinarily be eschewed

when the delay is not directly attributable to the plaintiff (as opposed to his attorney), when there is no actual prejudice caused to the defendant, and when the plaintiff's dilatory conduct has not been deliberate. See John, 828 F.2d at 1131-32; Rogers, 669 F.2d at 320-21. Moreover, it is generally expected that the district court should first consider the efficacy of lesser sanctions, such as imposing attorneys' fees or court costs caused by the plaintiff's unacceptable conduct, before dismissing the case. See Rogers, 669 F.2d at 321.

With due deference to the district court, and with recognition of its heavy docket, we believe that in the instant case the district court abused its discretion in dismissing the plaintiff's case with prejudice. First, we believe that the court was mistaken in observing that *both* parties showed "complete inattention" to litigating the case. The record reveals that the primary source of delay in discovery was not the plaintiff or her counsel,[4] but instead the counsel for the defendant. While two separate "joint" motions for extension of pre-trial deadlines were in fact filed by both sides' counsel,[5] the *defendants'* counsel not only filed *two* unilateral motions requesting delays in discovery, but also admitted at the pre-trial conference that he had failed to file a motion for summary

[4] Neither the defendants nor the district court have ever claimed that any delay in the pre-trial proceedings or the parties' failure to timely file a joint pre-trial order was in any way caused by the plaintiff herself.

[5] The second motion appears to have been prepared by counsel for the defendant.

judgment, which had been the reason for requesting the latter extension in the period of discovery. Furthermore, we observe that the *plaintiff* at one point during discovery filed a motion requesting the court to compel the *defendants* to answer the plaintiff's interrogatories. Such conduct belies the district court's claim that the plaintiff showed a "complete inattention" to the litigation.

Moreover, while it does not entirely excuse his failure to file a pre-trial order on June 15, 1992, counsel for the plaintiff did offer the district court plausible explanations for his tardiness. We also observe that the pre-trial order was apparently completed by the plaintiff on June 16, 1992, and was ultimately filed on June 18, 1992 -- a mere three days after the deadline.[6]

**III.**

In sum, we believe that the plaintiff's counsel has not displayed a "clear pattern of delay or contumacy." Accordingly, we REVERSE the district court's dismissal with prejudice, REINSTATE the case, and REMAND for further proceedings.

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[6] The two-day delay between June 16 and June 18 is apparently explained by the refusal of the defendants' counsel to sign the proposed joint order.

We also observe that counsel for the plaintiff did not receive actual notice of the district court's denial of the parties' second joint motion to extend the time for filing the pre-trial order until June 15, 1992 -- the very day of the deadline to file the order and one day before the pre-trial conference was scheduled.